No. 16214

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WILLIAM BOYD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was found guilty on August 11, 1958 after a court trial before the Honorable Dave Ling in the United States District Court for the Southern District of California, Central Division, of knowingly failing and refusing to be inducted into the armed forces of the United States in violation of Section 462, Title 50 Appendix, United States Code [Tr. 4-5].[1] Appellant was sentenced on August 25, 1958 to the custody of the Attorney General for a period of one (1) year [Tr. 5-7]. The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellant filed notice of appeal on September 2, 1958 in the manner prescribed by

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[1]Refers to the page numbers of the Transcript of the Record.

law [Tr. 7-8]. This Court has jurisdiction under Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

Statement of the Case.

January 22, 1953. Defendant registered with Local Board No. 113 in Alhambra, California, giving his place of residence as 2638 North Mountain View Road, El Monte, California, and stating that Mr. Robert Boyd, 1271½ South Barrington Ave., W. Los Angeles, Calif., was a person who would always know his address [SSF 2].[2]

March 9, 1953. Defendant returned his Classification Questionnaire to the Local Board, stating that he was not a minister and did not claim to be a conscientious objector [SSF 5-11].

June 17, 1953. Defendant advised Local Board of change in address to 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 3].

August 5, 1953. Local Board classified defendant 1-A [SSF 3, 12].

April 23, 1957. Defendant ordered to report for Preinduction Physical Examination. Order was sent to defendant's last known address, 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 17].

May 1, 1957. Order was returned to Local Board marked "unknown at address" [SSF 20]. Local Board sent letters to Mr. Robert Boyd, 1271½ South Barrington Ave., West Los Angeles, Calif., to the Occupant, 2638 North Mountain View Road., El Monte, Calif., and to the

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[2]Refers to penciled numbers at bottom of each page of defendant's Selective Service File, Government Exhibit 1.

Occupant, 1436½ Butler Ave., West Los Angeles, Calif. The letters asked for information on defendant's whereabouts [SSF 21-3].

May 3, 1957. Letter to Mr. Robert Boyd returned marked "unknown at address" [SSF 25].

May 7, 1957. Letter to Occupant, 2638 North Mountain View Road, returned marked "Left no address." [SSF 26].

May 22, 1957. Letter to Occupant, 1436½ Butler Ave., West Los Angeles 25, Calif., returned with notation: "I know of no one by that name [Boyd, Richard William]. I bo't this place about a year ago from a Mrs. Page. I have asked some of the neighbors, but they don't know him either. Almeda R. Allen."

September 5, 1957. Notice sent to defendant at his last known address, 1436½ Butler Ave., West Los Angeles 25, Calif., telling him that he had been declared delinquent for (1) failing to notify the Local Board of change in address and (2) failing to report for Preinduction Physical Examination [SSF 30].

September 10, 1957. Delinquency Notice returned to Local Board marked "unknown at number" [SSF 32].

September 24, 1957. Local Board ordered defendant to report for induction on October 25, 1957. The order was sent to defendant's last known address, 1436½ Butler Ave., West Los Angeles 25, Calif. [SSF 34-5].

October 1, 1957. Order returned to Local Board marked "unknown at address" [SSF 38-9].

October 25, 1957. Defendant failed to report.

November 7, 1957. Local Board advised United States Attorney that defendant was delinquent for failure to report for induction [SSF 40-1].

December 10, 1957. Defendant notified Local Board of change in address to 1271½ S. Barrington Ave., West Los Angeles 25, Calif. [SSF 42].

December 10, 1957. Defendant mentioned his conscientious objections *for the first time.* Said he, in a letter to the Local Board: "I would like to request an application for conscientious objector" [SSF 47]. The reason he had not made an application before, he said, was because "I was not as strong in my faith until recently" [SSF 49].

December 10, 1957. Local Board issued defendant a Special Form for Conscientious Objectors [SSF 50-5].

December 16, 1957. Defendant returned the Special Form for Conscientious Objectors [SSF 12].

January 6, 1958. United States Attorney wrote to the Local Board saying: "Since we are advised by the FBI that the above delinquent registrant has been located and is in contact with his local board, it is agreeable with this office for you to act again in this case" [SSF 56].

January 10, 1958. United States Attorney declined prosecution for reason that "Subject in favor of immediate induction as a delinquent" [SSF 57].

January 17, 1958. Local Board asked defendant for a statement as to whether he was considered a Pioneer by the Watchtower Bible and Tract Society [SSF 61].

January 20, 1958. Defendant replied that he was not a Pioneer but was a Congregational Publisher working toward becoming a Pioneer [SSF 58].

February 12, 1958. Local Board notified defendant that the "facts presented do not warrant the reopening or reclassification of your case at this time" [SSF 62].

February 12, 1958. Defendant ordered to report for induction on February 28, 1958 [SSF 63].

February 28, 1958. Defendant reported [SSF 87].

March 3, 1958. Defendant refused to submit to induction by taking "one step forward" [SSF 64-5, 91-2].

March 6, 1958. Local Board sent defendant's cover sheet to State Director, saying: "In view of the fact that the registrant has filed SS Form 150 [Special Form for Conscientious Objectors] claiming conscientious objection, it would be appreciated if you review the case with reference to Local Board Memorandum No. 14" [SSF 85-6].

March 7, 1958. Local Board sent supplementary letter to State Director [SSF 88].

March 26, 1958. State Director told Local Board that defendant should be reported to United States Attorney for prosecution [SSF 90].

April 4, 1958. Local Board reported defendant to United States Attorney for prosecution [SSF 91-2].

I.

Defendant Waived His Conscientious Objector Claim or Was Estopped to Assert It.

Deferment as a conscientious objector is a privilege which may be waived or abandoned like any other privilege. Said the Court in *United States v. Schoebel,* 201 F. 2d 31, 32 (7 Cir., 1953):

> "The burden is upon a registrant to establish his eligibility for deferment or exemption to the satisfaction of the local board, and to file a timely claim therefor. Deferment being a privilege, it may be abandoned by the holder like any other personal privilege. United States v. Rubinstein, 2 Cir., 166 F. 2d 249, 258, certiorari denied 333 U. S. 868, 68 S. Ct. 791, 92 L. Ed. 1146."

In the Special Form for Conscientious Objectors defendant stated that "since 1949 I have associated myself with them [Jehovah's Witnesses]" [SSF 53]. Yet, he did not tell the Local Board that he might claim conscientious objector status until December 10, 1957, almost two months after he had been ordered to report for induction. He then wrote the local board saying: "I would like to request an application for a conscientious objector" [SSF 47]. His only reason for delay was because he "was not as strong in [his] faith until recently" [SSF 49].

The Government takes the position that the defendant's failure to make a conscientious objector claim until after he was ordered to report for induction amounted to an abandonment of such claim or estopped him from asserting it.

Section 15(b) of the Selective Service and Training Act, Section 465(b), Title 50 Appendix, United States Code, states that "it shall be the duty of every registrant to keep his local board informed as to his current address." Defendant's failure to do so for over seven months, from May 1, 1957 to December 10, 1957, was a crime in itself. *Stumpf v. Sanford,* 145 F. 2d 270 (5 Cir., 1944).

The Government contends that defendant's crime of failing to inform his Local Board of his current address also constituted an abandonment of his claim or estopped him from asserting it. After all, had it not been for such crime the defendant would have been inducted on October 25, 1957, a full six weeks before he became strong enough in his faith to make a claim for deferment.

After the defendant returned the Special Form for Conscientious Objectors to the Local Board, he advised the United States Attorney that he was "in favor of

immediate induction" and prosecution was declined [SSF 12, 50-5, 57]. Defendant was again ordered to report [SSF 63]. Defendant reported but refused to be inducted [SSF 64-5].

The Government urges that defendant's representation to the United States Attorney that he was in favor of immediate induction was another instance of his waiver or abandonment of his claim for deferment.

II.

The Local Board Did Not Deny Defendant Procedural Due Process in Refusing to Reopen and Reclassify.

Assuming that defendant did not waive his claim and was not estopped to assert it, he was still not denied procedural due process. Section 1625.2 of the Selective Service Regulations,, 32 C. F. R. Section 1625.2, provides that:

> "The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; provided in either event, *the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.*" (Emphasis supplied.)

Section 1625.4 of the Selective Service Regulations, 32 C. F. R. Section 1625.4, further provides that:

> "When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it should not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

These two sections make it clear that:

(1) The local board "may" reopen a registrant's classification.

(2) A classification shall not be reopened after the local board has mailed an Order to Report for Induction unless there has been a change in registrant's status resulting from circumstances over which he has no control.

(3) The local board may consider information in deciding whether or not to reopen but this consideration alone is not a reopening.

In this case, the defendant did not request a conscientious objector form until after he had been ordered to report for induction [SSF 49].

Also, he did not fill out and return the Special Form for Conscientious Objectors until after he had been ordered to report [SSF 50-5].

Furthermore, the Local Board's inquiry as to whether defendant was a Pioneer and his reply thereto were not made until after defendant had been ordered to report [SSF 58, 61].

In short, the local board could not have reopened unless defendant showed a change in status over which he had no control. The strengthening of one's faith and the acquisition of conscientious objections, however, does not constitute such a change in status. The case in point is *United States v. Schoebel,* 201 F. 2d 31 (7 Cir., 1953). In that case the defendant was ordered on May 1, 1951 to report for induction on May 14. On May 8—for the first time—defendant claimed to be a conscientious objector. The local board considered the claim but refused to reopen. Defendant refused to be inducted and was convicted. In affirming, the court said:

> "Defendant quotes Sec. 1625.2 of the Selective Service Regulations which provides that a local board may reopen the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, or a person who claims to be a dependent, or (2) upon its own motion. However, in both instances the regulation provides, '* * * provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically, finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.' On oral argument before this court defendant's counsel suggested that conscientious objections resulting from

> the promptings of a registrant's conscience would be a change in status over which the registrant had no control. We cannot acquiesce in such a strained interpretation of the regulation. There was no other claim of a change in status. The board did not find any change in defendant's status, and therefore in failing to reopen defendant's classification it did not exceed its powers or acts in an arbitrary manner."

After the defendant returned the Special Form for Conscientious Objectors to the Local Board, they wrote the defendant, in accordance with the regulations, that the "facts presented do not warrant the reopening or reclassification of your case at this time" [SSF 62].

Paradoxically, the defendant now claims that the Local Board did what they said they were not doing and what the regulations said they could no do!

One case in the Southern District of California, *United States v. Monroe,* 150 Fed. Supp. 785, 789 (S. D. Cal., 1957), is directly in point. The facts there were as follows:

January 21, 1952. Defendant Monroe registered with Local Board No. 86 in Burbank.

April 20, 1954. The Local Board classified defendant 1-A.

Latter part of 1955. Defendant became associated with Jehovah's Witnesses but failed to notify the draft board until the events hereinafter related.

July 17, 1956. The Local Board, unaware of the defendant's newly acquired convictions, mailed an Order to Report for Induction on August 1, 1956. At that time, registrant's file was barren of any suggestion that he claimed to be a conscientious objector.

July 30, 1956. Registrant appeared at the Local Board and orally requested a Special Form for Conscientious Objectors, SSS Form 150. He did not then request a reopening nor claim an exemption from military service but merely indicated that he would return the form the following morning. At the time registrant procured the form he had not decided to request deferment as a conscientious objector, but intended to take more time to make up his mind whether he "was doing the right thing."

August 3, 1956. Local Board informed by Induction Station that defendant had appeared on August 1 but had refused to be inducted. Board also received a formal declaration (mailed on July 31st) that the registrant claimed to be a conscientious objector and would refuse to be inducted.

August 6, 1956. Special Form for Conscientious Objector received by the Local Board.

Judge Tolin's well-written opinion merits extensive quotation here. Said the Judge:

> "Unless the board's failure to reopen and consider anew registrant's classification constituted a denial of due process, registrant is guilty as charged. A valid order to report for induction imposed upon Monroe a duty to submit to induction, and his knowing refusal to perform that duty was a violation of the Universal Military Training and Service Act, 50 U. S. C. A. Appendix, § 462(a).
>
> "In evaluating Monroe's claim in this prosecution that the board's failure to reopen was so arbitrary and capricious as to make illegal the outstanding notice of induction, the Court does not sit as a super draft board. Judicial review of board action is severely limited, and our duty is done if we are solicitous that the registrant's treatment by the Selective Service

System was in accordance with due process and the Act and regulations which Congress has determined to be in the best national interest.

"The exemption granted by Congress is not a matter of right, but of legislative grace. Being a privilege, it may be abandoned by the holder like any other personal privilege. To be effective, claims to the exemption must be interposed in the manner and at the time prescribed by law or regulation.

"Selective Service Regulation 1625.2, 32 C. F. R. § 1625.2, provides in pertinent part as follows:

> '§ 1625.2 When registrant's classification may be reopened and considered anew. The local board may reopen and consider anew the classification of a registrant (a) upon the written request of a registrant, * * * if such request is accompanied by written information presenting facts * * * which, if true would justify a change in the registrant's classification; * * * provided * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.'

"The Regulation sets forth both the manner and the time in which requests for reopening, to merit consideration, must be made. The requirement that claims for reclassification be in writing and accompanied by a written statement of the facts upon which the registrant relies is no more than a reasonable administrative provision to enable the local board to assess fairly the seriousness and substantiality of the

registrant's request. Conversely, the insistence upon documentary information relieves the members of the board of the fruitless task of searching each tentative and ambiguous act of a registrant in order to ascertain whether it might not foretell the existence of an inchoate claim to exemption. In order to allow the board a fair opportunity to consider the request, the written information must be submitted sometime before the registrant is scheduled to be inducted. The cut-off date selected for this purpose by the Regulation, the date that the Order to Report for Induction is mailed, is a reasonable part of an orderly administrative process.

"The registrant complied with neither requirement laid down by the Regulation. Perhaps the Regulation would suffice to justify the board's inaction upon registrant's request solely on the ground that reclassification was not sought until after the mailing, on July 17, 1956, of the Order to Report for Induction. Whether that be so or not, his failure to file a written claim by August 1, 1956, the time of the scheduled induction itself, precludes registrant from asserting that he was denied due process of law. Resgistrant cannot now complain that the egg upon which he sat too long was not hatched. The written information required by law was filed too late, and the mere oral request for an SSS Form 150 was not a foundation which required the board to reopen registrant's classification and cancel his scheduled induction. Even assuming that the members of the board were immediately informed of registrant's appearance at the office, they could not know whether this equivocal act was the first step in an assertion of the claim. At most, the bare procurement of an SSS Form 150 indicated that the registrant was considering a change in his status upon which he might or might not ultimately base a request for reclassification.

"Registrant was entitled to Due Process, but he owed reasonable compliance with procedural requirements. There are two sides to every coin. He was denied no procedural right when he submitted no written information which the local board could process.

"The proposition that the untimely steps taken by registrant entitled him to a reopening is rejected. Any other conclusion would allow the indefinite avoidance of military service by registrants who visited their board offices on induction eve to secure Selective Service forms which, if filed, might have served as the basis for a reopening.

"It follows from the foregoing that the induction notice validly imposed upon registrant a duty to submit to induction. Accordingly, it is the judgment of this Court that defendant, having knowingly refused to perform that duty, is guilty of a wilful violation of the Universal Military Training and Service Act, 50 U. S. C. A. Appendix, § 462(a)."

In fact, Monroe had a more meritorious claim than Boyd. Monroe at least asked for a Conscientious Objector Form before his induction date, although after the mailing of the order to report. Boyd did not even do that. Boyd did nothing until almost two months after his induction date.

What then, it may be asked, was the Local Board doing in asking about defendant's pioneer status and in issuing a conscientious objector form? The answer is found in Section 1625.4, *supra:* They were merely considering information in deciding whether or not to reopen. They decided not to reopen and they so advised the defendant as required by the regulations [SSF 62].

Since the Local Board did not reopen they did not deny the defendant due process of law by failing to give him a personal appearance, notice of reclassification, right to appeal, etc. He was only entitled to such rights if his classification had been reopened.

III.

Defendant Was Not Denied Due Process Because He Could Not Appeal From the Local Board's Refusal to Reopen.

This point was decided in *Klubnikin v. United States,* 227 F. 2d 87, 90-1 (9 Cir., 1955). Judge Orr there said:

> "Appellant argues that the Selective Service Regulations provide no administrative appeal from a decision of a local draft board's refusing to reopen a case upon request of a registrant for reclassification and, hence, is a denial of due process.[3] The machinery established by the Selective Service Regulations is and of necessity must be geared to the prodigious task of processing millions of registrants.[4] The regulations grant an administrative appeal whenever there has been a reclassification of a registrant by his local draft board. See 32 C. F. R. § 1625.13. Moreover, whenever the local draft board initially determines that sufficient facts have been alleged by the registrant to warrant the reopening of his classification its final decision on whether or not a new classification shall be awarded is appealable. See 32 C. F. R. § 1625.11. It is only where the local board determines that the registrant has failed to set forth sufficient facts to warrant reconsideration that no administrative review is afforded. See 32 C. F. R. § 1625.4. Pro-

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[3]See 32 C. F. R. § 1625.

[4]See *United States v. Palmer* (3 Cir., 1955), 223 F. 2d 893, 895.

vision for review on refusal to reclassify would invite successive frivolous appeals designed to delay induction and frustrate the purposes of the Act.[5] The regulations provide for fair and adequate procedure."

IV.

The Authorities Cited by Defendant Are Distinguishable.

Defendant cites *United States v. Underwood,* 151 Fed. Supp. 874 (E. D. Pa., 1955), *United States v. Vincelli,* 215 F. 2d 210, 216 F. 2d 681 (2 Cir., 1954), *United States v. Packer,* 200 F. 2d 540 (2 Cir., 1952), *reversed on other grounds,* 346 U. S. 1 (1953), *Olvera v. United States,* 223 F. 2d 880 (5 Cir., 1955) and *Knox v. United States,* 200 F. 2d 398 (9 Cir., 1952), in support of his argument that the issuance of the Special Form for Conscientious Objectors constituted a reopening of defendant's classification.

These cases are not in point.

In *United States v. Underwood, supra,* there was no waiver of the defendant's claim nor an estoppel to assert it such as exists here.

In the other cases, the Special Forms for the Conscientious Objectors were apparently issued and returned to the local boards before the defendants were ordered to report for induction. Thus, the clear mandate of Section 1625.2, *supra,* was never encountered.

Here, however, the Special Form was neither issued nor returned until after both the mailing of the order to report and the induction date.

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[5]See United States *ex rel. La Charity v. Commanding Officer,* (2 Cir., 1944), 142 F. 2d 381, 382.

V.

Section 1625.2 Is Not Void nor Inapplicable to Conscientious Objector Cases.

Section 6(j) of the Military Training and Service Act, Section 456(j), Title 50 Appendix, United States Code, provides that

> "nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

While Congress did not set a cutoff date for claiming exemption in so many words, they intended that it should be the date the defendant was ordered to report for induction.

Section 6(j), as it appeared in the Selective Service and Training Act of 1948, 62 Stat. 604, was amended by Section 1(g) of Public Law 51, 65 Stat. 75, 86, on July 15, 1951. The amendment provided that conscientious objectors should perform twenty-four months of civilian work in lieu of deferment. The portion of 6(j) quoted above was not changed.

Section 1625.2 of the Selective Service Regulations, contained in Executive Order 9988, issued August 21, 1948, provided at the time of the 1951 amendment that "the registration of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252). . . ."

The 1951 amendment shows Congressional approval of the 1948 regulation. The authority is *Sterrett v. United States,* 216 F. 2d 659, 665 (9 Cir., 1954). There the court was also interpreting Section 6(j). Appellants had

been classified I-O, conscientious objector, by their local boards and had appealed for IV-D, minister, classifications. The Appeal Board held they were not entitled to the I-O classifications. The question was whether they were entitled to a conscientious objector hearing by the Department of Justice. Section 6(j) provided for such hearing if the conscientious objector claim was "not sustained by the local board." The Government contended that the claim was sustained by the local board and hence they were not entitled to a hearing. The court, however, decided otherwise. The court said that during the time that 6(j) was in effect as part of the 1940 Act and after the re-enactment of that section in 1948 the regulations had provided for a conscientious objector hearing in all cases where the appeal board denied the claim, regardless of whether it had been sustained by the local board. Then the court said:

> "When Congress substantially reenacted the provisions of the 1940 Act [in 1948], the Administrative Regulations . . . interpreting and construing the Act and long continued without substantial change will be deemed to have received Congressional approval."

This language is as applicable to the 1951 amendment as to the 1948 re-enactment. Thus, Section 1625.2 should be deemed to have received Congressional approval.

Conclusions.

1. Defendant waived his conscientious objector claim or was estopped to assert it.

2. The Local Board did not deny defendant procedural due process in refusing to reopen and reclassify.

3. Defendant was not denied due process because he could not appeal from the Local Board's refusal to reopen.

4. The authorities cited by defendant are distinguishable.

5. Section 1625.2, is not void nor inapplicable to conscientious objector cases.

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